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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

LOOPNET, INC.
Subpoena Enforcement Matter

COSTAR REALTY, INC., a Delaware
corporation and COSTAR REALTY
INFORMATION, INC., a Delaware
corporation

v.

LOOPNET, INC., a California corporation.

MISCELLANEOUS ACTION
Case No. CV 05-80294 – Misc. VRW (JL)

**OPPOSITION TO MOTION TO
COMPEL ADDITIONAL RESPONSE
TO 17 U.S.C. § 512(h) SUBPOENA**

Date: Aug 2, 2006
Time: 9:00 a.m.
Courtroom: F (15th Floor)
Before: The Hon. James Larson

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1 **I. INTRODUCTION**

2 While CoStar Realty, Inc. and CoStar Information, Inc.’s (“CoStar”) motion to compel
3 compliance with a document subpoena appears at first blush to be a run of the mill discovery
4 dispute, a closer look reveals it to be much more significant and nefarious.

5 CoStar’s unusual subpoena was issued under Section 512(h) of the Copyright Act, a
6 statute of questionable constitutionality which permits subpoenas to be issued by the Court in
7 limited circumstances where there is no litigation pending. Both the language of the statute and
8 the statutory scheme make clear that a Section 512(h) subpoena is available for the narrow
9 purpose of permitting a copyright owner to obtain from an online service provider the identity of
10 an infringer who has posted allegedly infringing material to the service provider’s website and
11 whose identity cannot otherwise be ascertained. And as CoStar’s papers concede (albeit in a
12 roundabout manner), LoopNet, Inc. (“LoopNet”) has fully complied with the subpoena (and then
13 some) to the extent CoStar seeks the identity of commercial real estate brokers who have posted
14 or “uploaded” allegedly infringing photographs as part of their real estate listings on LoopNet’s
15 website. Indeed, CoStar knew the identity of those alleged infringers even before seeking
16 permission from this Court to serve the Section 512(h) subpoena, since the names of the brokers
17 are (not surprisingly) prominently identified on each of the listings in question.

18 Not content with this information, CoStar’s motion seeks to compel the production of
19 documents sufficient to identify all of the people who have “downloaded” any of the identified
20 photographs. It is unclear whether CoStar is seeking the identity of anyone who “downloaded”
21 the photographs in the common sense of the word “download” (*i.e.*, persons who have
22 affirmatively acted to save a copy on his or her computer hard drive), or whether CoStar is
23 actually seeking the identity of anyone who ever accessed the webpages containing the
24 photographs and looked at the photos. Either way, this request (like CoStar’s request in its
25 moving papers to conduct a deposition of LoopNet to gather more information about LoopNet’s
26 compliance with the subpoena) falls outside the limited scope of discovery authorized under
27 Section 512(h), and unnecessarily invades the privacy of those viewing LoopNet’s website.

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1 More fundamentally, either way, LoopNet does not have the information requested, and
2 therefore has nothing else to produce in response to the subpoena. As the accompanying
3 Declaration of Wayne Warthen plainly demonstrates, CoStar’s rank speculation to the contrary is
4 merely that: unsupported conjecture that is premised on inaccurate assumptions and a
5 fundamental misunderstanding of how LoopNet’s system works.

6 Indeed, CoStar’s insistence on pursuing the identities of the persons who have viewed the
7 listings at issue (and who would therefore be potential CoStar customers) raises serious concerns
8 regarding whether CoStar is truly seeking the information *only* for the purpose of protecting its
9 rights under the Copyright Act, as Section 512(h) requires. It is important for the Court to
10 understand that while CoStar has asserted over the past seven years that hundreds of real estate
11 brokers have posted thousands of purportedly infringing photographs on LoopNet’s website,¹
12 CoStar does not appear ever to have initiated litigation against any of these alleged infringers
13 (although CoStar has aggressively and unsuccessfully maintained litigation against LoopNet for
14 passively hosting the listings at issue). And the timing of this motion to compel, filed as
15 LoopNet was in the process of preparing for its recently completed (and very successful) Initial
16 Public Offering, casts further doubt on CoStar’s motivations.

17 Regardless of CoStar’s motives, however, LoopNet can only repeat what it has told
18 CoStar on numerous occasions: LoopNet does not possess or otherwise maintain information
19 that would identify down loaders of purported infringing photographs. Put another way, there is
20 no information that LoopNet can be compelled to provide, because no such information exists.
21 For this and other reasons, CoStar’s motion to compel should be denied.

22 **II. FACTUAL BACKGROUND**

23 **A. LoopNet’s Business.**

24 LoopNet and CoStar both offer online solutions to commercial real estate agents and
25 brokers to assist with marketing and searching for commercial real estate. [Declaration of
26

27 ¹ Contrary to CoStar’s suggestion that LoopNet’s website is rife with infringing
28 photographs, these photographs constitute just a fraction of one percent of the photographs that
have been posted or uploaded onto the LoopNet system.

1 Wayne Warthen in Opposition to CoStar’s Motion to Compel Additional Response to 17 U.S.C.
2 § 512(h) Subpoena (“Warthen Decl.”), ¶ 4.] Traditionally, real estate agents and brokers,
3 working on behalf of commercial real estate sellers and landlords, have marketed their property
4 listings through low-technology methods such as word of mouth, signage, shared hardcopy
5 availability lists, print advertisements, and direct mail and email campaigns. [*Id.*] The process
6 of searching for commercial properties available for sale or for lease has been similarly difficult.
7 Unlike the residential real estate industry, which is served by local multiple listing services or
8 other central local databases of residential real estate properties available for sale, there has not
9 been an equivalent listing service in the commercial real estate industry. [*Id.*] Both LoopNet
10 and CoStar have stepped in to fill that void. In so doing, they each offer online information
11 services that compete with this traditional model. [*Id.*]

12 Since its founding in the late 1990’s, LoopNet has grown to become one of the leading
13 providers of products and services tailored to the national and local needs of the commercial real
14 estate industry. [Warthen Decl., ¶ 5.] The LoopNet online marketplace contains more than
15 \$300 billion of property available for sale and 2.8 billion square feet of property available for
16 lease. [*Id.*] The listings for these properties, which often contain photographs, are almost
17 exclusively posted by realtors, and in many instances by individuals affiliated with prominent
18 national real estate brokerages such as Coldwell Banker, RE/MAX Commercial, Century 21 Real
19 Estate and others.² [*Id.*]

20 As is clear from the nature of LoopNet’s business, the identities of the persons who
21 upload (or direct others to upload) real estate listings containing photographs to the LoopNet
22 system is not a secret. Indeed, the entire purpose of the listing is to introduce potential buyers of
23 commercial real estate to the property and to the seller of the property. This purpose could not
24 be achieved if the potential buyers were unaware of the listing broker or how to contact them.

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² LoopNet does not independently post any real estate listings or photographs itself. [Warthen Decl., ¶ 5.] Rather, LoopNet provides a web hosting service that enables users who wish to display real estate over the Internet to post listings for those properties on the LoopNet system.

1 Thus, as evidenced by a sample LoopNet listing, LoopNet Property Profiles prominently display
2 the identity of the uploader on their face. [Warthen Decl., ¶¶ 12, 13 & Exh. A.]

3 Not surprisingly, given the number of listings it hosts, LoopNet’s website receives more
4 visitors than any other commercial real estate listing service, with more than 1.2 million
5 registered members, and 550,000 unique visitors monthly. [Warthen Decl., ¶ 5.] While many of
6 these visitors are LoopNet members, CoStar is incorrect when it asserts that only LoopNet
7 subscribers can view the listings. [*Id.*, ¶ 11.] Rather, a substantial portion of LoopNet’s listings
8 are accessible to unregistered users (although certain listings and many of LoopNet’s special
9 features are available only to subscribers). [*Id.*]

10 LoopNet’s success is aptly evidenced by its recent completion of a very successful Initial
11 Public Offering on June 7, 2006. Indeed, LoopNet’s current market value is in excess of
12 \$500,000,000.³ [Declaration of Kenneth B. Wilson in Opposition to CoStar’s Motion to Compel
13 Additional Response to 17 U.S.C. § 512(h) Subpoena (“Wilson Decl.”), ¶ 2 & Exhs. A, B.]

14 In sum, LoopNet cannot fairly be described as some small fly-by-night operation; to the
15 contrary, it is a successful and well-managed company that has grown from a small start-up
16 organization to the most popular on-line commercial real estate listing in the world in just under
17 ten years.

18 **B. The History of CoStar’s Use of Litigation as a Tool Against LoopNet.**

19 For nearly a decade, CoStar has attempted to use the legal process to intimidate and
20 harass LoopNet, presumably with the hope that it will impact LoopNet’s business. For example,
21 in 1999, CoStar filed suit against LoopNet and its then President, Dennis DeAndre, in federal
22 court in Maryland for copyright infringement and a variety of other statutory and common law
23 claims. [Wilson Decl., ¶ 5.] The purported infringement in that case was based on the allegation
24 that third party realtors and/or brokers had purportedly posted infringing photographs on
25 LoopNet’s website, although it is significant to note that none of those brokers was named in the

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27 ³ It can hardly be a coincidence that CoStar filed its instant Motion to Compel as the
28 shares for LoopNet’s IPO were in the process of being priced. CoStar was given leave to file the
motion on April 6, 2006, but waited over six weeks to do so.

1 suit. Indeed, although CoStar has identified thousands of purportedly infringing photographs
2 that have been posted by third party brokers and realtors on LoopNet’s website, to LoopNet’s
3 knowledge CoStar has never initiated suit against any of those brokers—including the individual
4 uploaders that LoopNet has already identified in response to the instant subpoena. [Wilson
5 Decl., ¶ 9.]

6 After obtaining Mr. DeAndre’s dismissal from the case because he had no contacts with
7 the State of Maryland, LoopNet moved for summary judgment on CoStar’s various claims. In a
8 published opinion issued on September 28, 2001, the district court largely granted that motion,
9 holding among other things that LoopNet was not a direct infringer of CoStar’s photographs.
10 *See CoStar Group Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688 (D. Md. 2001).

11 Following the district court’s ruling, LoopNet and CoStar entered into a Settlement
12 Agreement, the terms of which are Confidential, pursuant to which CoStar dismissed all of its
13 claims with prejudice with the exception of its direct copyright infringement claim, and judgment
14 was entered against CoStar on that claim in accordance with the district court’s opinion. [Wilson
15 Decl., ¶ 6 & Exh. C.] Although CoStar subsequently appealed that judgment, in 2004, the 4th
16 Circuit Court of Appeals issued an opinion affirming the judgment in favor of LoopNet, again
17 specifically holding that LoopNet had not engaged in direct copyright infringement. *See CoStar*
18 *Group Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

19 Notwithstanding these rulings, LoopNet has continued to receive accusatory and
20 threatening notices from CoStar complaining that, notwithstanding LoopNet’s efforts, a number
21 of alleged CoStar photographs have been posted to the LoopNet system. [Wilson Decl., ¶ 8.] In
22 each case, LoopNet has promptly removed the photographs and informed the uploader of the
23 photograph that doing so was improper and in violation of LoopNet’s Terms and Conditions and
24 to refrain from doing so in the future. [Warthen Decl., ¶ 19.] This has always been, and still is,
25 the practice at LoopNet. [*Id.*]

26 Most recently, October 28, 2005, CoStar sent a notice letter which identified some 1,735
27 photographs allegedly owned by CoStar that were available on the LoopNet system. [Wilson
28 Decl., ¶ 10 & Exh. D.] LoopNet responded to this complaint, as it had responded to prior

1 complaints, by immediately removing the identified photographs, notifying the brokers
2 submitting those photographs of the possible violation of LoopNet’s Terms and Conditions, and
3 directing them to refrain from posting photographs to which they do not own rights. [Warthen
4 Decl., ¶¶ 19, 20.]

5 **C. LoopNet’s Total Compliance with CoStar’s Section 512(h) Subpoena.**

6 On December 23, 2005, nearly two months after LoopNet removed the photographs from
7 its system, CoStar served a subpoena issued by the clerk of this Court pursuant to 17 U.S.C. §
8 512(h) (Title II of the Digital Millennium Copyright Act (“DMCA”)), even though there is no
9 litigation pending between the parties. By statute, that subpoena required CoStar’s sworn
10 declaration that “the purpose for which the subpoena is sought is to obtain the identity of an
11 alleged infringer and that such information will only be used for the purpose of protecting rights
12 under this title.” 17 U.S.C. § 512(h)(2)(c); [Wilson Decl., ¶ 12 & Exh. E.] The Section 512(h)
13 Subpoena identified the same 1,735 photographs from CoStar’s October 28, 2005 notice.
14 [Wilson Decl., ¶ 12 & Exh. E.]

15 In the subpoena, CoStar directed LoopNet to provide “information sufficient to identify
16 the individual(s) who have infringed CoStar’s copyrights by uploading or downloading” a
17 CoStar photograph. CoStar defined “uploading” to mean “posting, submitting, providing,
18 transmitting or copying” to the LoopNet system and “downloading” to mean “copying,
19 transferring, or obtaining from any server owned or operated by LoopNet a digital copy of one or
20 more of CoStar’s photographs.” LoopNet has done just that.

21 In particular, LoopNet initially responded to the subpoena by producing (along with its
22 objections) several thousand pages of its on-line listings; although these were the same
23 documents that CoStar had provided to LoopNet with its Section 512(c) notice, they
24 unquestionably identified the realtors or brokers that had posted the listings (and therefore the
25 photographs), and therefore satisfied the demands of the subpoena.⁴ LoopNet did not produce

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27 ⁴ Because the identity of the realtors and brokers that had uploaded the allegedly
28 infringing photographs appeared on the face of the Property Profiles provided to LoopNet with
CoStar’s Section 512(c) notice, LoopNet considered not producing anything, rather than re-

1 any documents identifying any persons that “downloaded” the photographs at issue because it
2 has no ability to identify such persons. [Wilson Decl., ¶ 14.]

3 Upon receiving LoopNet’s production, CoStar attempted to expand the scope of the
4 subpoena by requesting additional information not required by either the subpoena or Section
5 512(h), and by demanding answers to questions about how LoopNet’s system operates (which
6 also fall beyond the scope of the statute). [Wilson Decl., ¶ 19.] While CoStar characterizes
7 LoopNet’s response as “unacceptable,” then “evasive,” and ultimately “implausible,” LoopNet
8 was in fact far more forthcoming than required by the highly-specific and unique obligations
9 imposed by Section 512(h). Indeed, as the voluminous meet and confer correspondence reveals,
10 LoopNet has already provided substantial information explaining the scope of its production,
11 although no such explanation is required by statute. [Wilson Decl., ¶¶ 16, 18, 20 & Exhs. H, J,
12 L.] A Section 512(h) subpoena is not a standard discovery subpoena, such as that authorized by
13 Fed.R.Civ.P. 45. Nor is its scope governed by the standards of traditional discovery. Unlike
14 discovery stemming from a case or controversy, a Section 512(h) subpoena exists where there is
15 no pending action.⁵ Its scope is thus not the broad “likely to lead to admissible evidence”
16 standard that obtains to traditional discovery, but rather the limited scope outlined in the text of
17 Section 512(h) itself: “information sufficient to identify the alleged infringer of the material

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21 producing documents that CoStar had already provided to LoopNet. However, LoopNet was
22 concerned that if it produced nothing (*i.e.*, if it objected that CoStar already had the information),
CoStar would bring a motion to compel, and that by producing the Property Profiles it could
avoid such a motion.

23 ⁵ That a Section 512(h) subpoena issues outside of any actual case or controversy renders
24 it of suspect Constitutional validity. *See, e.g., In re Charter Commc’ns, Inc.*, 393 F.3d 771, 777-
25 78 (8th Cir. 2005) (“We comment without deciding that this provision *may* unconstitutionally
26 invade the power of the judiciary”) (emphasis in original); *see also In re Subpoena to University*
27 *of North Carolina at Chapel Hill*, 367 F. Supp. 2d 945, 954 (M.D.N.C. 2005). However,
28 LoopNet did not feel the need to provide a detailed argument regarding the more complex
Constitutional questions here because the only information that CoStar seeks is that concerning
downloaders and LoopNet simply does not have any information that would enable it to identify
a downloader. If the Court disagrees, LoopNet would be happy to provide supplemental briefing
on the Constitutional issues.

1 described in the notification to the extent such information is available to the service provider.”
2 17 U.S.C. § 512(h)(3).

3 Therefore, the only information to which CoStar has ever been entitled is “information
4 sufficient to identify the alleged infringer of the material described in [CoStar’s October 28,
5 2005 takedown] notification to the extent such information is available to the service provider.”
6 17 U.S.C. § 512(h)(3), (h)(5). LoopNet has gone beyond this.

7 As noted above, LoopNet’s first responsive production consisted of documents that show
8 on their face the name of the realtor, agent or broker who uploaded the photograph or directed
9 someone else to do so. However, when CoStar complained about that method of production,
10 LoopNet provided the names of the uploaders in a single document, along with the names of
11 other individuals affiliated with the listing realtor, agent or broker. [Wilson Decl., ¶ 18.]

12 And with respect to downloaders, LoopNet consistently and repeatedly advised CoStar
13 that LoopNet does not have any information that would identify a “downloader” of a particular
14 image.⁶ [Wilson Decl., ¶ 24 & Exh. K.] As LoopNet has already explained to CoStar, to the
15 extent CoStar’s subpoena seeks the identity of someone who has affirmatively “downloaded” an
16 image (*e.g.*, who took affirmative steps to save the image on his or her computer), LoopNet
17 cannot determine which users might have taken affirmative steps to download a photograph from
18 their browsers by “right clicking” the image to “save to disk.” [Warthen Decl., ¶ 17.] LoopNet

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21 ⁶ CoStar has accepted such representations in the past from other parties, making its
22 continued pursuit of information from LoopNet particularly suspect. *See CoStar Group et al v.*
23 *Catylist Real Estate Software, Inc.*, Case No. 1:05-cv-07192 (N.D. Ill. 2006) (CoStar stipulated
24 to a Protective Order that would require Catalist to provide information only regarding uploaders
25 “based on Catalist’s express representation that Catalist does not maintain information as to
26 whether any of the Photographs were downloaded.”) CoStar’s dogged pursuit of information
27 that would reveal the identities of alleged downloaders from LoopNet in the face of LoopNet’s
28 representation that no such information exists smacks of anticompetitive motivations.
Anticompetitive uses of Section 512(h) like this were explicitly foreseen by Congress when the
DMCA was being debated. H. Hrg. No. 105-102, at 16 (1998) (“While the [section 512(h)(3)]
declaration process is useful, there are no means set out to ensure that this process is not abused.
Particularly in circumstances involving competitors or critics, it is not difficult to imagine that
copyright holders might use their right under 512[h] to investigate and gather information about
the activities of others that would not generally be available in the off-line world.”)

1 is unaware of any means for a service provider to track that information, and can confirm with
2 certainty that it does not track such information itself. [*Id.*]

3 Moreover, and as detailed below, even under CoStar’s incredibly broad definition of
4 downloader (which appears to extend to those who merely *view* a website), LoopNet simply has
5 no information that is capable of identifying which users “downloaded” any specific
6 photograph.⁷ [Warthen Decl., ¶¶ 17, 18.]

7 In no way does Section 512(h) impose on LoopNet any obligation to answer CoStar’s
8 questions where it has no responsive information. Nonetheless, through the meet and confer
9 process, and after LoopNet had provided all information available to it that would be sufficient to
10 identify an alleged infringer of the CoStar photographs (*i.e.*, the uploaders of the photographs),
11 CoStar peppered LoopNet with a series of interrogatory-style questions. In response, LoopNet
12 *voluntarily* told CoStar that it did not “maintain information that would identify persons who
13 download purported infringing photographs,” and provided substantial information explaining
14 why no additional documents were being produced. [Wilson Decl., ¶ 20 & Exhs. H, J, L.]
15 LoopNet has consistently, and patiently, explained that it simply does not collect or maintain the
16 type of information CoStar seeks. [*Id.*] Nonetheless, on the basis of a number of fundamentally
17 mistaken assumptions about the manner in which the LoopNet system operates, CoStar has
18 ignored these representations and continued to demand that LoopNet provide it documents
19 identifying so-called “downloaders.” [*Id.*, ¶ 19 & Exhs. I, K.] CoStar’s apparent dissatisfaction
20 with LoopNet’s response led to the filing of this motion. [*Id.*, ¶ 20.]

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24 ⁷ There are serious doubts concerning CoStar’s assertion that by merely viewing a
25 website, a user engages in conduct sufficient to give rise to copyright liability. *See, e.g., Perfect*
26 *10 v. Google, Inc.*, 416 F. Supp. 2d 828, 852 n.17 (C.D. Cal. 2006) (rejecting argument that
27 merely by viewing websites, the individual users of Google who make local “cache” copies of
28 the plaintiff’s photos thereby directly infringe through reproduction). Once again, LoopNet did
not feel the need to provide a detailed argument regarding complex copyright questions such as
whether such individuals who merely view an online image can be an “infringer” for purposes of
Section 512(h) in the context of this particular discovery dispute, because LoopNet simply does
not have any information that would enable it to identify such individuals.

1 **D. The Basics of the LoopNet System.**

2 **1. How Property Profiles are created and photographs are**
3 **added to the LoopNet System.**

4 The LoopNet system contains thousands of real estate listings known as “Property
5 Profiles, “ which are the heart of the company’s listing service. [Warthen Decl., ¶ 6.] At the
6 time of the filing of this Opposition, LoopNet had approximately 360,000 commercial real estate
7 listings on its site, approximately 252,000 of which included photographs.⁸ [Id.] Each one of
8 the thousands of real estate listings on the LoopNet system is posted by a user of the LoopNet
9 system. In a very simple process designed to automate the creation of a Property Profile, users
10 fill out an input form on the LoopNet system that asks for certain information about the property
11 they wish to list. [Id.] That information includes (among other things) the property name,
12 property type, address, building square footage, year built, a property description, an area
13 description, and identifying information about the presenting broker. [Warthen Decl., ¶ 7.]

14 Since it initiated its open, web-based listing service, LoopNet has maintained a strict
15 policy against users posting any materials that infringe upon any third party rights, and has
16 required each broker posting a listing to acknowledge and agree that it has all rights in the
17 content being posted. [Warthen Decl., ¶ 7.] Indeed, before a user can create a Property Profile,
18 the user must agree to LoopNet’s “Terms and Conditions” which state:

19 Customer shall not submit any property descriptions, photographs, financial,
20 contact or other information (“Listings”) to the LoopNet website unless (i)
21 Customer has received all necessary rights and authorizations, including without
22 limitation from the owner of the property listed, any necessary agents or brokers,
the author of the Listing, including the photographer and/or copyright owner of
any photographs....

23 [Warthen Decl., ¶ 9.] Once a LoopNet user fills out the input form, clicks the “I agree to
24 LoopNet’s Terms and Conditions. . .” check-box and then clicks the “Save Listing” button, a

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26 ⁸ In its motion, CoStar baldly asserts that “[i]n many cases, the photographs on
27 LoopNet’s website have been unlawfully copied directly from CoStar’s website.” [Motion at p.
28 1.] Yet the aggregate total number of LoopNet listings containing photographs for which CoStar
has issued a DMCA takedown notice to LoopNet is 3,304—which represents just 0.33% of all
listings with photos that have ever been on the LoopNet system. [Warthen Decl. ¶ 19.]

1 unique property identification number is assigned to the listing, a web page containing the real
2 estate listing and the property identification number is automatically created from the
3 information provided by the user, and the newly created Property Profile is added to the system
4 so that it may immediately be viewed and searched by LoopNet users. [*Id.*]

5 In the process of creating a Property Profile, a user may choose to “submit graphics” (*i.e.*,
6 photographs) to add to the listing. [Warthen Decl., ¶ 10.] To add a photograph, the user must fill
7 out another form that requires the user to submit the property identification number and
8 password and to identify the photos the user wants to submit. [*Id.*] Before the photograph may
9 be posted, the user must also agree to another, photograph-specific term:

10 Submission of photographs: You may not submit a building photograph unless
11 you are sure that you own the photo or have the right to provide it to LoopNet. In
12 particular, do not submit any property photographs taken by or obtained from
third parties unless you have a written agreement authorizing you to submit such
photographs.

13 Only after these steps have all been completed are any photographs placed live on the LoopNet
14 system. [*Id.*]

15 **2. LoopNet neither collects nor maintains information that**
16 **would enable anyone to identify who viewed a particular**
image.

17 Notwithstanding CoStar’s unsupported speculation to the contrary, LoopNet simply
18 cannot look through its records to identify the downloader of any specific photograph because its
19 records do not have data that would reveal that. [Warthen Decl., ¶ 17.] LoopNet maintains a list
20 of “attachments” associated with each Property Profile. Each of the noticed CoStar photographs
21 was just such an attachment. Every attachment has a type (*e.g.*, main photo, property photo, etc.)
22 and status (*e.g.*, active or deleted). LoopNet does not, however, maintain a time-based history of
23 the attachment’s type or status. [*Id.*] Thus, it is literally impossible to determine from the
24 information available to LoopNet whether or not any user’s access to a particular Property
25 Profile indicates that any certain photograph was viewed. Each and every one of the functions
26 that CoStar highlights in its Motion and the Simuro Declaration as evidence of possible
27 infringement are all keyed in some way to the relevant Property Profile. [*Id.*, ¶ 14.] This applies
28

1 equally to LoopNet’s “ProspectList Lead Generator,” “Saved Property Folder” feature,
2 “Exposure Reports,” and its “Custom Marketing Emails” feature.⁹ [*Id.*, ¶ 15.]

3 An example is illustrative here. When CoStar notified LoopNet in October 2005 that it
4 believed there were infringing photographs on certain listings, LoopNet took immediate action.
5 LoopNet promptly removed the identified photograph under the terms of the parties’ settlement
6 agreement, and treated the uploader according to LoopNet’s infringer policy.¹⁰ But because
7 LoopNet does not track the date or time of when any specific photograph was the active main
8 photo for a specific listing, LoopNet cannot know if a specific user who viewed the listing ever
9 saw the noticed photograph.¹¹ LoopNet’s records regarding access to specific Property Profiles
10 simply will not shed any light on whether the individual who viewed that Property Profile did so
11 when any certain photograph was posted or not.

12 **III. ARGUMENT**

13 **A. There Is No Information Available To LoopNet That Is Sufficient To**
14 **Identify Individuals Who Allegedly Downloaded CoStar Photographs,**
Therefore Section 512(h) Does Not Apply To Downloaders Here.

15 A Section 512(h) subpoena can only be sought and issued for a single purpose: to obtain
16 information that will assist a copyright owner in identifying the alleged infringer of its work. 17

18 _____
19 ⁹ Mr. Simuro speculates that certain of these features result at least in additional copies
20 being made on the LoopNet system. Or, in the case of “Custom Marketing Emails,” actually
21 copied and distributed. [Simuro Decl., ¶ 18.] He is mistaken. Each of these features links to
22 Property Profile or associated content. [Warthen Decl., ¶¶ 21-23.]

23 ¹⁰ While CoStar now seeks information that would identify *any* “downloader,”
24 throughout the meet and confer process CoStar was quite clear that it actually was seeking
25 something else: “individuals that disseminate and make derivative uses of CoStar Photos
26 following their initial unlawful posting.” [Wilson Decl., ¶ 19 & Exh. K.] Those individuals
27 would certainly be a subset of the “downloaders” CoStar now seeks to identify, but it is a subset
28 that is not capable of being identified.

¹¹ As a technical matter, a LoopNet user who merely views the LoopNet website without
doing anything further makes either a very temporary copy of portions of website in RAM, and
perhaps (although not necessarily, depending on how the user’s Internet browser’s cache is
configured) a somewhat temporary copy of the website on the hard drive. In either case, the user
may not realize that either of these copies have been made. Even under the most expansive
interpretation of “downloader,” LoopNet does not possess or otherwise maintain the requested
information.

1 U.S.C. §§ 512(h)(2)(c), 512(h)(3). To that end, the statute provides that an Internet Service
2 Provider (“ISP”) responding to a Section 512(h) subpoena is to “disclose to the copyright owner .
3 . . . information sufficient to identify the alleged infringer of the material described in the
4 notification to the extent such information is available to the service provider.” 17 U.S.C.
5 § 512(h)(3). It follows then, based on the plain language of the statute, that if a service provider
6 does not possess information that is “sufficient to identify the alleged infringer,” it does not
7 possess information that would assist in the “identification of an alleged infringer.”

8 In this way, a Section 512(h) subpoena is like any other discovery tool—it only calls for
9 the production of information that exists. *See, e.g., Clark v. Willamette Industries, Inc.*, 918
10 F.Supp. 139, 143 (W.D. Pa. 1996) (noting that, in response to motion to compel, it would be “of
11 little use for this Court to order the production of documents which do not exist”). Similarly
12 here, LoopNet can not be compelled to produce information that simply does not exist.

13 The Report of the House Committee on Commerce on the Digital Millennium Copyright
14 Act of 1998 explained that the § 512(h) subpoena for disclosure is intended to be “interpreted as
15 requiring disclosure of information in the possession of the service provider, rather than obliging
16 the service provider to conduct searches for information that is available from other systems or
17 networks.” H. Rpt. No 105-551, Part 2, at 61 (1998). There is nothing unique in Section 512(h)
18 that permits copyright owners to skirt this most fundamental and existential requirement.

19 **1. There is no information available to LoopNet that would**
20 **enable the identification of an alleged infringer who**
21 **“downloaded” purportedly infringing images.**

22 Section 512(h) was not designed to enable copyright owners to obtain the records of the
23 users of a service provider’s system where those records cannot reveal a nexus between the user
24 and the copyrighted work claimed to have been infringed. Without that nexus, those records are
25 by definition inherently insufficient to “identify the alleged infringer” of the noticed work.
26 There would be no way to tie the user to the work claimed to be infringed.

27 LoopNet does not have any information that would enable identification of an individual
28 who took affirmative steps to download copies of a photograph or save one. [Warthen Decl.,

1 ¶ 17.] At the outside, those are the only potential alleged downloading infringers about whom
2 CoStar would be is entitled to information under the law.

3 As described above and in the Warthen Declaration, the information that the LoopNet
4 system tracks concerning the photographs associated with Property Profiles is not even capable
5 of enabling anyone to confirm which photograph was viewed by any specific user at any specific
6 time. [Warthen Decl., ¶ 17.] That is because LoopNet does not maintain date and time
7 information regarding the status of photographs. Such information simply has no business value
8 to LoopNet and is not important to the functioning of its system. Due to the technical nature of
9 how the LoopNet system functions, then, LoopNet cannot discern whether a user who has seen a
10 Property Profile viewed the profile before, while, or after any photograph at all – including an
11 alleged CoStar Photograph – was displayed on the Property Profile. [*Id.*] The data cannot reveal
12 any nexus between a user and a photograph because there is no time or date information that
13 would capture or otherwise be “sufficient to identify” who accessed a Property Profile that
14 contained an alleged CoStar photograph while that photograph was posted. Section 512(h) is
15 inapplicable to these unidentifiable theoretical infringers.¹²

16 **2. Based on CoStar’s sworn declaration, the instant subpoena**
17 **cannot extend to information that is not sufficient to identify**
18 **the alleged infringer of an alleged CoStar photograph.**

19 A Section 512(h) subpoena is a unique creature that exists in a vacuum apart from any
20 pending case or controversy. Unlike a standard subpoena which can be issued by attorneys
21 during litigation, the issuance of a Section 512(h) subpoena is expressly conditioned on the

22 _____
23 ¹² To aid its misguided effort, CoStar’s motion focuses on LoopNet’s representation
24 during the meet and confer process that LoopNet “does not maintain documents” that contain the
25 information it seeks. [Motion at 7, 8, 11.] While that was and is true, CoStar’s focus on that
26 language in isolation is mistaken. The broader explanation – made before those quoted
27 statements regarding documents – that “LoopNet does not maintain information that would
28 identify persons who download purported infringing photographs” better explains why Section
512(h) does apply to the unidentifiable class of “downloaders” that CoStar seeks here. [Wilson
Decl. 20 & Exh. L.] LoopNet simply does not possess *any* information that would enable it to
distinguish an alleged infringing downloader from any casual user of its website. Indeed, in
contrast to the situation with uploaders, to view photographs on LoopNet’s website one does not
even need to be a member. [Warthen Decl. 11.]

1 copyright owner first providing the court with a sworn declaration swearing that “the purpose for
2 which the subpoena is sought is to obtain the identity of an alleged infringer and that such
3 information will only be used for the purpose of protecting rights under this title.” 17 U.S.C. §
4 512(h)(2)(c); S. Rep. No. 105-190, at 51 (1998); H. Rep. No. 105-551, Part 2, at 60 (1998).

5 A Section 512(h) subpoena is therefore limited to obtaining information that would (i) be
6 capable of identifying an alleged infringer and (ii) could (and “will only”) be used to protect the
7 copyright owner’s interest under the Copyright Act. The additional information regarding
8 downloaders that CoStar seeks to compel LoopNet to produce satisfies neither of these
9 conditions and is therefore outside the scope of what a Section 512(h) subpoena can permissibly
10 seek.

11 **B. Section 512(h) Is Limited And Covers Only Uploaders of Material To**
12 **The Internet, Not Downloaders of Material From the Internet.**

13 Even if LoopNet were in possession of information that could identify the downloader of
14 an alleged CoStar photograph, the structure and plain language of the DMCA shows that Section
15 512(h) does not target downloaders. There can be no question that the emphasis of Congress in
16 enacting the DMCA was placed on the identifiable uploaders of copyrighted materials to the
17 Internet, not downloaders. *Hearing on the National Information Infrastructure Copyright*
18 *Protection Act of 1995* Before the House Committee on the Judiciary, 104th Congress (1996)
19 (statement of Senator Conrad Burns) (commenting that one of the goals of the DMCA was to
20 find a way for content owners and ISPs to cooperate in dealing with “the dilemma of infringers
21 and pirates who take the content from products such as books, magazines, and compact disks and
22 electronically transferring [sic.] it to files that can be accessed over the Internet”).

23 The DMCA’s central means for addressing infringement – the “notice and takedown”
24 scheme – that it features in all but one of the four safe harbors is inextricably linked to the “user”
25 and “alleged infringer” that uploaded the alleged copyrighted material to the ISP’s system for
26 storage. See 17 U.S.C. § 512(b), (c), (d), (h)(3). See also *Recording Industry of America, Inc. v.*
27 *Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1237 (D.C. Cir. 2003) (noting that § 512(h) is
28 structurally linked to the storage functions of an ISP).

1 In Section 512(h), Congress devised a mechanism that affords copyright owners a limited
2 means for uncovering the identity of “*the* alleged infringer” of the copyrighted work stored by
3 the Internet Service Provider (“ISP”) about which it provided notice under Sections 512(b), (c)
4 or (d). 17 U.S.C. § 512(h)(3) (emphasis added); *Verizon*, 351 F.3d at 1233, (quashing subpoena
5 sent to an ISP that merely transmitted the allegedly infringing material, because “a § 512(h)
6 subpoena simply cannot meet the notice requirement of § 512(c) (3)(A)(iii).”)

7 Indeed, Section 512(h) subpoena is inextricably linked to the Section 512(c)(3)(A)
8 notification that must precede its issuance. *Compare* 17 U.S.C. §512(h)(2)(A) *with* 17 U.S.C.
9 §512(c)(3)(A). Thus, Section 512(h) is linked to the broader concepts of Section 512(c), as well.
10 That section provides a safe harbor for ISPs from liability for “infringement of copyright by
11 reason of the storage at the direction of *a user* of material that resides on a system or network
12 controlled or operated by or for the service provider.” 17 U.S.C. §512(c) (emphasis added). The
13 “user” referenced in Section 512(c) is the person who caused the material to come to be stored
14 on the ISP’s system or network—in other words, that “user” is the *uploader* of the material.

15 The language of Section 512(h) itself further underscores that it is the uploader
16 referenced in Section 512(c), not some speculative downloader, about whom an ISP must
17 provide identifying information when it is available. Section 512(h) states that a service
18 provider, once served with a subpoena, must disclose “information sufficient to identify *the*
19 alleged infringer of *the material described in the [Section 512(c)(3)(A)] notification* to the extent
20 such information is available to the service provider.” *Id.* (emphasis added). This distinct effort
21 to connect “*the* alleged infringer” (*i.e.*, the singular uploader of the allegedly infringing work) to
22 the “material described in the [takedown] notification” (*i.e.*, the allegedly infringing work), as
23 opposed to the multiple persons who may have “downloaded,” or under CoStar’s definition
24 merely viewed the work at issue, makes perfect sense. The “alleged infringer” referenced in
25 Section 512(h) is the “user” referenced in Section 512(c): the uploader.

26 Indeed, it is definitional that for any material stored by a user on an ISP’s system about
27 which a copyright owner could provide Section 512(c)(3)(A) notification, there is a user who
28

1 uploaded the material. The same cannot be said of a downloader, whose existence is far from
2 certain.

3 A Section 512(h) subpoena must be construed in this context. By its express terms and
4 plain language, Section 512(h) concerns the identification of “the alleged infringer” who made
5 available the copyright work “stored” in Sections 512(b), (c), and (d). It is that single uploading
6 “user” and “alleged infringer” to which Sections 512(b), (c), (d), and therefore 512(h), relate.
7 They simply do not reach into the vague and indeterminate realm of those who might have
8 potentially “downloaded” the work.

9 **C. The Activities Of LoopNet Users Are Protected By The First**
10 **Amendment And Costar Has Failed To Meet Its Burden Of Piercing**
11 **Their Anonymity**

12 It is axiomatic that reading, like speaking, is a protected activity under the First
13 Amendment to the United States Constitution. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (“If
14 the First Amendment means anything, it means that a State has no business telling a man, sitting
15 alone in his own house, what books he may read or what films he may watch.”). This protection
16 extends to reading anonymously. *Lamont v. Postmaster General of U.S.*, 381 U.S. 301, 305
17 (1965) (recognizing the important First Amendment right to receive information anonymously).
18 There is no principled distinction between offline reading and browsing the Internet, whether the
19 identity of the Internet browser is known or whether she is anonymous. There is a tension, then,
20 between an Internet user’s rights and the legitimate right of a copyright owner to seek to stamp
21 out the infringement of its works.

22 Courts have confronted this tension before in the context of a copyright owner seeking to
23 uncover the identity of an otherwise anonymous alleged infringer of its work. *See, e.g., Sony*
24 *Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) (balancing
25 competing interests of copyright owners with those of anonymous alleged infringers whose
26 identities were requested through a subpoena issued under Fed.R.Civ.P. 45). To balance these
27 interests, courts have adopted a multi-part test to decide whether to compel the identification of
28 an anonymous Internet speaker. In *Sony*, where the identities of a number of anonymous file

1 sharers were sought, the court considered the following factors to weigh the need for disclosure
2 against First Amendment interests:

3 (1) a concrete showing of a prima facie claim of actionable harm; (2) specificity
4 of the discovery request; (3) the absence of alternative means to obtain the
5 subpoenaed information; (4) a central need for the subpoenaed information to
advance the claim; and (5) the party's expectation of privacy.

6 *Id.* at 564-565 (internal citations and quotations omitted).¹³

7 The *Sony Entertainment* court ultimately concluded that revealing the identity was called
8 for based on the facts before it. *Id.* at 564. However, there are two critical distinctions between
9 the identities sought in that case and the identities of the downloaders CoStar now seeks that
10 renders that conclusion unhelpful here (although the reasoning is still sound). In *Sony*
11 *Entertainment*, the anonymous alleged infringers were affirmatively downloading music to their
12 hard drives that they reasonably understood to be infringing; in contrast, the purported
13 downloaders under CoStar's definition did nothing more than view a photograph of real property
14 on a website where the vast, vast majority of images are legal. Moreover, in *Sony Entertainment*,
15 plaintiff possessed the Internet Protocol ("IP") address of each of the Doe defendants and it had
16 proof that tied each of those IP addresses directly to the files Sony claimed had been illegally
17 swapped. *Id.* at 566. All the *Sony Entertainment* plaintiff needed was to match that information
18 in its possession with the records it was seeking from the defendants' ISPs. *Id.* In contrast, as
19 explained in detail throughout this Opposition, LoopNet has no records that would enable CoStar
20 to determine who allegedly downloaded its photographs. Revealing the information in
21 LoopNet's possession might, however, possibly reveal the identities of those anonymously
22 browsing its website.

23 Consequently, methodically marching through all of the *Sony Entertainment* factors is not
24 called for here: CoStar fails at the first step. Armed only with the allegation that its copyrighted
25 photographs were uploaded to the LoopNet system, CoStar cannot make "a concrete showing of

26
27
28 ¹³ An even stricter test might be appropriate here, but in this case CoStar cannot even
begin to meet the first of the *Sony Entertainment* factors.

1 a prima facie claim of actionable harm.” A prima facie claim of copyright infringement consists
2 of two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of
3 the work that are original.” *Identity Arts v. Best Buy Enterprise Servs., Inc.*, 2006 WL 328423,
4 *5 (N.D. Cal. 2006) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361
5 (1991)). While CoStar may be able to allege ownership of a valid copyright which would
6 therefore be sufficient to satisfy the first element, the only copying that it can demonstrate is that
7 of the uploader of the photographs it has identified. LoopNet has already provided information
8 sufficient to identify those individuals. And neither CoStar, nor LoopNet itself, can identify the
9 downloaders.

10 Because no information exists that is sufficient to identify the downloaders, CoStar
11 cannot satisfy the second element of its prima facie case as to those individuals. It therefore fails
12 the *Sony Entertainment* test. It would be particularly inappropriate to invade the private sphere
13 of protected speech for such a futile effort. CoStar simply cannot meet its burden as to the
14 downloaders, and the disclosure it seeks should not be ordered.

15 **D. CoStar Is Not Permitted To Depose LoopNet Under Section 512(h).**

16 CoStar’s overreaching extends beyond bringing a motion to compel the production of
17 information it knows does not exist. It also seeks to depose LoopNet’s “technical personnel” to
18 learn how the system of a key competitor functions in an effort to truth squad LoopNet’s sworn
19 statements that it does not possess information capable of identifying those who may have
20 downloaded alleged CoStar photographs from the LoopNet system. [*Compare* Motion at p. 3
21 *with* Warthen Decl., ¶ 17] However, Section 512(h) does not allow for deposition under any
22 circumstances and none should be authorized here. Indeed, Section 512(h)(6) makes specific
23 reference to a subpoena *duces tecum*, which by definition calls solely for the production of
24 documents.

25 The deposition CoStar seeks is not only unauthorized, it is also unwarranted. Section
26 512(h) only allows inquiry into information “sufficient to identify the alleged infringer of the
27 material described in the notification to the extent such information is available to the service
28 provider.” 17 U.S.C. § 512(h)(3). As has been amply explained to CoStar on multiple

1 occasions, and again in this Opposition, there is no such information as relates to potential
2 downloaders of alleged CoStar photographs from the LoopNet system. This means that no
3 information exists in either LoopNet's computers or the heads of its personnel. Thus, even were
4 a deposition statutorily authorized, it would be without any purpose here.

5 **Conclusion**

6 For the foregoing reasons, CoStar's motion to compel and request to depose LoopNet
7 technical personnel should be denied.

8
9 DATED: June 16, 2006

PERKINS COIE LLP

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11 By _____
Michael H. Rubin

12 Attorneys for
13 LOOPNET, INC.
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